IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. 500

STATE OF WASHINGTON,

Petitioner,

v.

COLUMBIA STEEL COMPANY.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent's contention at pages 15 to 17 of its brief in opposition that the petition was "presented too late" calls for a short statement in reply. Inasmuch as other argument contained in respondent's brief is answered in detail by the brief in support of the petition for certiorari, no reply will be made thereto.

FINAL JUDGMENT WAS ENTERED ON OCTOBER 4, 1949

Time for filing a petition for certiorari is computed from the date of entry of the final judgment, though such be a mnisterial act, where State procedure requires the entry thereof.

In the jurisdictional statement of the petition the facts surrounding the entry of the judgment here sought to be reviewed have been set forth. Respondent questions the date upon which said judgment became final, invoking § 2101(c), Judicial Code, which requires the filing of the petition within ninety days after the entry of such judgment as is in § 1257(3), Judicial Code, denominated a "final judgment." The *en banc* opinion of the Supreme Court of Washington was entered on September 3, 1949 (R. 39). The judgment of the Supreme Court of Washington was entered on October 4, 1949 (R. 46). The petition for certiorari was filed in this Court on December 27, 1949.

There are two departments of the Supreme Court of Washington. § 3, Chapter 24, Washington Laws of 1909. Appellate cases are heard and decided by a department of the court, except where it is ordered that the case be heard and decided *en banc*. § 4, Chapter 24, Washington Laws of 1909. This case was heard (on the second appeal) by the Court sitting *en banc*. No departmental hearing or decision was had. In consequence, the provisions of § 5, Chapter 24, Washington Laws of 1909, apply to the decision rendered by the court. Insofar as here material that statute provides as follows:

> "* * * every decision of the court *en banc* shall be final except in cases in which no previous decision has been rendered in one of the depart-

ments, and in such cases the decision of the court *en banc* shall become final thirty days after its filing, unless during such period a petition of rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: Provided, that if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon."

Inasmuch as the decision rendered September 3, 1949, was that of the court *en banc* and no departmental decision had preceded it, the decision did not become final until thirty days after its filing. This is so because no petition for rehearing was filed during that period and no order of the court was entered providing that the decision should go into effect prior to the expiration of the thirty-day period.

The result is that the *decision* of the Supreme Court of Washington became final thirty days after September 3, 1949, or on October 3, 1949. In accordance with the requirement of the last sentence of the statute above quoted, judgment was thereupon issued on October 4, 1949. Not until this date was a final *judgment* in existence which would be subject to the review of this court.

Finality for the purpose of review by this court, is predicated upon a *judgment* of the state court, and not upon its *decision*, where state practice distinguishes the two and requires that a judgment issue. The last sentence of the above-quoted statute specifically requires that a judgment shall issue when the decision has be-

come final. Therefore, when the petition in this cause was filed in this court on December 27, 1949, it was within the ninety days of the entry of such final judgment, as required by § 2101(c), Judicial Code.

This precise question was passed upon by this Court in *Puget Sound Power & Light Company v. City of Seattle*, 264 U. S. 22, cited in the Jurisdictional Statement of the petition. In that case the Washington Supreme Court had issued a departmental decision, but the case was reargued before the Court sitting *en banc* following which an *en banc* opinion was filed on June 12, 1922. The judgment was not entered until July 12th. Despite the fact that the statute above quoted provided that the decision was final when rendered (because a departmental opinion had previously been rendered), this Court held that the "final judgment" was the formal judgment, though only of a ministerial character, and that the time for filing should be computed therefrom. We quote from that decision construing the same Washington statutes now in effect:

> "If a hearing *en banc* is ordered and had, as here, the decision is final when filed; but in all cases where the decision is final, there is a specific provision that a judgment shall issue thereon. It is apparent that, however final the decision may be, it is not the judgment. It is said that the latter is a mere formal, ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the state, which counsel seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916, *supra*, fixing the time in which writs of error must be applied for and allowed. The motion to dismiss the writ granted the Power Company must be denied."

The above cited case is controlling. It is an even stronger case than would be necessary to support the instant problem, for there the decision was final although no judgment had been entered. Here the decision was not final until the day before the formal judgment was entered. This Court in the *Puget Sound Power & Light Company* case has held that, where the state statute requires as a separate act that a formal judgment be entered, no final judgment exists within the meaning of Federal judicial procedure until such judgment is entered, regardless of the finality of the decision upon which such judgment is entered.

CONCLUSION

The petition for a writ of certiorari was filed within ninety days of the entry of the final judgment by the Supreme Court of Washington, this court computing the time for such filing from the date of entry of the formal judgment as required by Washington statutes.

DATED this 25th day of January, 1950, at Olympia, Washington.

Respectfully submitted,

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